NO. HHB-CV-17-6038099-S	:	SUPERIOR COURT
	:	
TESLA, INC.	:	JUDICIAL DISTRICT OF NEW BRITAIN
	:	AT NEW BRITAIN
VS.	:	
	:	TAX AND ADMINISTRATIVE APPEALS
CONNECTICUT DEPARTMENT OF	:	SESSION
MOTOR VEHICLES; MICHAEL BZDYRA,	:	
COMMISSIONER OF MOTOR VEHICLES;	:	
	:	
and	:	
	:	
CONNECTICUT AUTOMOTIVE	:	
RETAILERS ASSOCIATION, INC.	:	APRIL 4, 2018

REPLY BRIEF OF PETITIONER TESLA, INC.

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ARGUMENT

This Court is presented with the question whether the activities at Tesla's Greenwich gallery constitute "selling" or "offering for sale" new motor vehicles in Connecticut within the meaning of C.G.S. § 14-52. As explained in Tesla's opening brief, they do not. Tesla does no more at the gallery than display example vehicles, educate consumers about them and promote their benefits, and explain how consumers may lawfully purchase them online or at licensed Tesla stores in other states. The Hearing Officer recognized this in his decision, but wrongly concluded that those activities require a license under § 14-52. That conclusion was incorrect, and this Court owes no deference on that issue of pure statutory interpretation.

Neither CARA nor DMV offers any persuasive argument to the contrary. Instead, they spend much of their briefs emphasizing Tesla's *non-gallery* activities, which are irrelevant here and, in any event, do not constitute selling or offering for sale vehicles in Connecticut. When they do address Tesla's gallery activities, CARA and DMV blatantly misstate the record. And they urge an interpretation that goes well beyond the statute's plain terms. That construction would render the statute ambiguous and make it difficult for any business to determine which activities require a license and which do not. It also would render § 14-52 unconstitutional, as it would prevent Tesla from exercising its First Amendment right to promote its indisputably lawful products to Connecticut citizens who may buy them through lawful out-of-state sales channels.

I. TESLA'S GALLERY ACTIVITIES DO NOT REQUIRE A DEALER'S LICENSE

The question before this Court is whether Tesla's gallery activities constitute activities for which a license is required under Section 14-52. The law and the record make clear they do not.

a. Section 14-52(a) requires a license only for "selling" and "offering for sale" vehicles, not for promotional activities that do not qualify as sales or offers

Section 14-52(a) prohibits "engag[ing] in the business of selling, [or] offering for sale … any motor vehicle" without a dealer's license. Those terms have established meanings. As Tesla described in its opening brief, "[a] 'sale' consists in the passing of title from the seller to the buyer for a price," C.G.S. § 42a-2-106(1), and an "offer" for sale is a promise that "creates a power of acceptance in the offeree to transform the offeror's promise into a contractual obligation," *Kieffer v. Danaher, Tedford, Lagnese & Neal, P.C.*, No. 26 81 78, 1990 WL 265725, at *10 (Conn. Super. Ct. Dec. 20, 1990); *accord Cavallo v. Lewis*, 1 Conn. App. 519, 520 (1984) (per curiam) (offer to sell creates "a power of acceptance in" the offeree).

Rather than apply those well-settled definitions, the Hearing Officer asserted—without citation—that "[t]he sale of motor vehicles is a process involving a number of activities including but not limited to advertising, merchandizing, facilitating, and educating, none of which individually or less than collectively constitutes selling," leaving entirely to the imagination exactly what is prohibited under the statute. Am. Decl. Ruling 4 (AR847). This Court owes no deference to that interpretation. Where, as here, a statute "has not previously been subjected to judicial scrutiny or time-tested agency interpretations," its construction "is a question of law for the courts where the administrative decision is not entitled to special deference." *Conn. State Med. Soc'y v. Conn. Bd. of Exam'rs in Podiatry*, 208 Conn. 709, 718 (1988). Moreover, a single agency interpretation is not sufficient to warrant deference. *Holston v. New Haven Police Dep't*, 323 Conn. 607, 612 n.6 (2016) (agency's interpretation of a statute accorded deference only where "that interpretation must formally have been articulated and applied 'over a long period of time'"). Thus, the Court's review is de novo, *see, e.g.*, *Comm'r of Pub. Safety v. Freedom of Info. Comm'n*, 301 Conn. 323, 338 (2011), because "it is for the courts, and not administrative

agencies, to expound and apply governing principles of law," *Conn. Ass'n of Not-For-Profit Providers for the Aging v. Dep't of Soc. Servs.*, 244 Conn. 378, 389 (1998) (quotation omitted).

In any event, the Hearing Officer's interpretation cannot withstand any standard of review. Courts must "interpret statutes as they are written" and "cannot, by construction, read into statutes provisions which are not clearly stated." *In re Bachand*, 306 Conn. 37, 56 n.8 (2012). Section 14-52 bars unlicensed "selling" or "offering for sale" of vehicles, but says nothing about promotional activities. Had the legislature intended to require a dealer's license to "advertise" or "merchandize" vehicles, or to "educate" consumers about them or "facilitate" lawful sales in other states, it would have done so expressly. *See* Tesla Br. 27-28; *Marchesi v. Bd. of Selectmen of Town of Lyme*, 309 Conn. 608, 618 (2013) ("[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly or to use broader or limiting terms when it chooses to do so.").

CARA and DMV argue that the use of those terms in other statutory provisions indicates that § 14-52 encompasses them as well, but the exact opposite is true. *See IBM Corp. v. Brown*, 167 Conn. 123, 133-36 (1974) (rejecting state agency's attempt to import words from one statute to another statute omitting those words). The fact that the legislature used the term "merchandising" in neighboring § 14-51 demonstrates that its decision to leave that term out of § 14-52 was a conscious one.[1] *See* CARA Br. 20; DMV Br. 16-17. It is § 14-52, and not § 14-51, that specifically governs which activities require a dealer's license. Similarly, CARA's citation to C.G.S.

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[1] Accordingly, the Hearing Officer erred in adding the term "merchandizing" to his recitation of the statutory requirement. Am. Decl. Ruling 5 ¶ 28 (AR848). To the extent that addition changes the meaning of § 14-52, the Court should reject it. It is worth noting, however, that neither the Hearing Officer, nor CARA, nor DMV, has explained why the term "merchandising" has a meaningfully different definition than buying, selling, offering for sale, and/or brokering. One way to understand the legislature's use of different terms in § 14-51 and § 14-52 is that it viewed the term "merchandising" as shorthand for the terms listed in § 14-52.

§ 42-133r, a provision defining the term "dealer" as "any person engaged in the business of selling, offering to sell, soliciting or advertising the sale of new motor vehicles," but ***only*** "[a]s [it is] used in sections 42-133r to 42-133ee, inclusive," shows that "advertising" is a separate activity from "selling" or "offering to sell" and is listed explicitly when the legislature intends it to be part of a definition. That is confirmed by the very case on which DMV relies: "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed …." *Ames v. Comm'r of Motor Vehicles*, 70 Conn. App. 790, 800-801 (2002), *aff'd*, 267 Conn. 524 (2004); *see* DMV Br. 18-19. That principle is especially important for § 14-52, because violating its licensure requirement is a criminal offense. C.G.S. § 14-52(d). And § 14-52(d)'s criminal penalties for unlicensed activity are limited to exactly the same activities for which § 14-52(a) requires a license. To ensure fair notice to the public, the requirement must be construed both narrowly and precisely. *See, e.g.*, *State v. Moulton*, 310 Conn. 337, 364 (2013); *Duplin v. Shiels, Inc.*, 165 Conn. 396, 399 (1973).

CARA cites *A Better Way Wholesale Autos, Inc. v. Commissioner of Motor Vehicles*, No. HHB-CV13-6022694-S, 2014 WL 6805131 (Conn. Super. Ct. Oct. 28, 2014), for the proposition that § 14-52(a) must "encompass more than simply the passage of title during the consummation of a sale." CARA Br. 20-21 & n.11. But *A Better Way* is patently unhelpful to CARA's and DMV's position here. Although the case at one point involved § 14-52(a), the Superior Court based its holding on a *different* provision of the statute, not at issue here, and found ***no*** violation of § 14-52(a). 2014 WL 6805131, at *5. And on appeal, the Appellate Court expressly noted that "the issue of whether the plaintiff violated § 14-52(a) is not before us." 167 Conn. App. 207, 215 (2016), *appeal dismissed*, 328 Conn. 245 (2018) (per curiam). Moreover, the Appellate

Court ultimately reversed the judgment of the Superior Court, finding no statutory violation at all. *Id.* at 219. *A Better Way* thus offers no support for CARA and DMV's position, as it did not reach any holding of possible relevance to this case.

More generally, it is telling that CARA and DMV abandon the statutory text in trying to defend the Hearing Officer's interpretation and criticize Tesla's. CARA Br. 20; DMV Br. 15. There is nothing "absurd" in the legislative decision to define "dealer" differently for different purposes or to require a license only for the specific activities enumerated in § 14-52. *See* CARA Br. 21; DMV Br. 18. CARA asserts that Tesla's interpretation would allow for an end-run around the rule of C.G.S. § 14-52b(b) that vehicle manufacturers cannot hold dealer's licenses, but that argument simply assumes its conclusion. *See* CARA Br. 21-22. The requirements are clear: licenses are required only for "selling" or "offering for sale" vehicles—as the text of § 14-52 plainly provides—and engaging in other activities the statute does not prohibit cannot be considered an end-run around that statute.

Indeed, it is CARA and DMV's interpretation—not Tesla's—that "would yield unreasonable and irrational results." DMV Br. 20. Neither CARA nor DMV disputes that the Hearing Officer's unbounded definition—under which "[t]he sale of motor vehicles is a process involving a number of activities including *but not limited to*" the four enumerated, "none of which individually or less than collectively constitutes selling"—is facially ambiguous.[2] *See* Am. Decl. Ruling

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[2] DMV suggests that "Tesla could have sought an articulation of the Hearing Officer's decision, which would have served to dispel any ambiguity by clarifying the factual and legal basis upon which the [Officer] rendered [his] decision." DMV Br. 14 n.5 (internal quotation marks omitted). But the issue is not that the record is inadequate, and the Hearing Officer stated his grounds for decision in a written opinion. There is no ambiguity about what the Hearing Officer did—only impermissible uncertainty ***inherent in the test*** he adopted. *Cf. Stone-Krete Constr., Inc. v. Eder*, 280 Conn. 672, 685-686 (2006) (articulation "appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification"). In any event,

4 (AR847) (emphasis added). It is impossible to discern whether or why Tesla's activities meet this limitless definition, and it would be similarly impossible to evaluate the conduct of any other business held to this standard. Nor could such a vague definition be the one the legislature intended—particularly where the statute imposes criminal penalties. *See* Tesla Br. at 28-29.

For all these reasons, the Hearing Officer's unsupported and inscrutable statutory interpretation must be rejected. The definitions of "selling" and "offering for sale," as set out above and in Tesla's opening brief (at 13, 21-22), are those established in statutory and case law: "[a] 'sale' consists in the passing of title from the seller to the buyer for a price," C.G.S. § 42a-2-106(1), and an "offer" for sale is a promise that "creates a power of acceptance in the offeree to transform the offeror's promise into a contractual obligation," *Kieffer*, 1990 WL 265725, at *10.[3]

b. Tesla is not "selling" or "offering for sale" vehicles at the Greenwich gallery

The plain language of § 14-52 renders this case straightforward. As detailed in Tesla's opening brief, and consistent with the Hearing Officer's decision, the record shows that title to a

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"[t]he failure of any party … to seek articulation … shall not be the sole ground upon which the court declines to review any issue or claim on appeal." Practice Book § 61-10(b).

[3] DMV claims, remarkably, that the terms "selling" and "offering" for sale mean something substantively different than the terms "sell" and "offer"—specifically, that "selling" and "offering" purportedly encompass "the process leading up to the outcome it is associated with, and not [just] the actual [sale or offer] itself." DMV Br. 20. But the same dictionary DMV cites makes clear the common-sense point that "selling" is simply the present participle or gerund of "sell," and that "offering" is the present participle or gerund of "offer." Webster's II New College Dictionary 569, 739, 1003 (1995). "They are merely different syntactical forms of the same word," with no substantive difference in meaning. *State v. Schmid*, 859 N.W.2d 816, 821 (Minn. 2015) (addressing the terms "take" and "taking"); *see* C.G.S. § 1-1(a). Indeed, DMV itself uses the terms "sell" and "offer" interchangeably with "selling" and "offering": Its own brief describes § 14-52 as mandating a dealer's license "to sell or offer to sell motor vehicles." DMV Br. 31. This is hardly surprising, as it would be absurd (as well as improper for a statute with criminal penalties) to construe the term "selling" as meaning something other than making actual sales—particularly in a provision that also lists the lesser-included term "offering." The fact that DMV is forced to resort to these bizarre arguments highlights the weakness of its position.

Tesla vehicle never passes at the Greenwich gallery and gallery employees do not make offers that create the power of acceptance in a customer. Tesla therefore is neither selling nor offering for sale vehicles at its Greenwich gallery and does not require a license to maintain its operation.

CARA and DMV seek to obscure this clear-cut conclusion through misrepresentation and distraction. They litter their briefs with false assertions, belied by the record, of what takes place at Tesla's galleries. And they peddle a plainly erroneous interpretation of the contract that governs Tesla's online sales—which, in any event, are not at issue here—to support their false claim that the contract provides for passage of title in Connecticut. Their arguments must be rejected.

1. CARA and DMV repeatedly distort the record evidence of Tesla's gallery activities

CARA and DMV paint a picture of Tesla's current gallery operations that does not square with either the record or the Hearing Officer's decision. Contrary to CARA's claim, there simply is no evidence that gallery employees make "offers that could be accepted" to purchase Tesla vehicles. *See* CARA Br. 3. Instead, the record emphatically shows that they are forbidden from doing so: Gallery employees may not take orders and have no authority to make promises creating a power of acceptance in customers. Tesla Ex. 18, at 2 (AR660). Gallery manager George Bodenheimer testified without contradiction that he does not even allow customers to accept Tesla's ***online*** offers at the gallery. Tr. Vol. 2 (Bodenheimer), at 160:16-19, 172:17-18 (AR480, 492). As Mr. Bodenheimer explained, gallery visitors can configure vehicles on an internet display, but cannot place an online order there; anyone who ultimately chooses to order a Tesla car online ***must do so elsewhere***. Tr. Vol. 2 (Bodenheimer), at 141:6-142:8, 160:16-19 (AR461-62, 480). Similarly, the evidence does not show that gallery employees provide price

quotes for vehicles. *See* CARA Br. 3, 6-7, 15, 27; DMV Br. 7. Rather, Mr. Bodenheimer ***forbids*** employees from discussing specific prices. Tr. Vol. 2 (Bodenheimer), at 140:21-141:5, 150:13-151:2 (AR460-61, 470-71); *see* Tesla Br. 5, 25 n.13.[4]

Likewise, no evidence whatsoever supports the assertion that gallery employees are "responsible for closing sales." CARA Br. 5. CARA and DMV rely heavily on the fact that gallery employees ***at one time*** received compensation based on purchases visitors later made ***outside*** the gallery (*i.e.,* online and at Tesla stores in other states). CARA Br. 2-3, 5-6, 10, 14-15, 27; DMV Br. 6-8, 21-23, 31-32. But that was perfectly consistent with Connecticut law allowing referral to lawful out-of-state sales channels. Tesla Br. 5 n.4. And as the Hearing Officer found, Tesla ***discontinued*** all such commissions or bonuses in 2016. Am. Decl. Ruling 3 (AR846). The purpose of a declaratory ruling proceeding is to guide parties' behavior ***going forward***, not to adjudicate discontinued practices not at issue. Tesla Br. 20.[5]

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[4] Nor does Tesla "offer[] test drives from the Greenwich location." CARA Br. 7; *see also id.* at 2, 10, 14, 16-18, 26-27; DMV Br. 7, 21-22, 31. Rather, employees can arrange for demonstration drives in company-owned vehicles kept elsewhere. Tesla Br. 3, 25; Tr. Vol. 2 (Bodenheimer), at 132:14-24, 137:16-139:11 (AR452, 457-59).

[5] CARA claims that Tesla "admitted" its gallery activities "may be illegal" in its 2010 prospectus and 2014 communications with DMV, and by lobbying the legislature. CARA Br. 8-9, 21-22. That is triply wrong. *First*, the 2010 prospectus for Tesla's initial public offering did not admit that any Tesla operations were "illegal," but merely disclosed to shareholders, without reference to any particular state, that "***it is possible that a state regulator could take the position*** that activities at our gallery constitute an unlicensed motor vehicle dealership." CARA Ex. 13, at 2 (AR319) (emphasis added). *Second*, Tesla's 2014 communications with DMV took no position on what constitutes a "sale" or "offer to sell" in Connecticut, *see* CARA Ex. 5 (AR308-10), but merely outlined for DMV what a Tesla gallery in Connecticut would have looked like in 2014. Tesla subsequently abandoned that plan and, after reviving its plan to open a gallery in 2016, concluded that only local zoning approval would be needed because the gallery would not sell or offer cars for sale. *Third*, Tesla's promotion of legislation that would permit direct-selling manufacturers like Tesla to operate retail stores in Connecticut only confirms that Tesla's gallery, which does not sell or offer cars for sale, is ***lawful***. Under current law, Tesla has had to ham-

In the face of the established record to the contrary, CARA and DMV assert that the Greenwich gallery operates no differently from Tesla's licensed stores in other states; from that false premise, they argue that the Greenwich gallery thus must be "offering" cars for sale, even if Tesla and the consumer transact the sales elsewhere. CARA Br. 5, 10-12, 14-15, 26-27; DMV Br. 6, 8. Besides failing to engage with the established definition of what constitutes an offer for sale, the premise of this argument is directly refuted by the record. Tesla Br. 25-27. As Tesla has highlighted consistently, the Greenwich gallery is far different than a Tesla store, including because gallery employees cannot discuss specific prices and terms, take orders, facilitate financing or trade-ins, or allow in-state transfer of title at the time of pickup, much less take an order from a customer or close a sale. And, as noted, a customer cannot order a vehicle while in the gallery, even online. *See* Tesla Br. 26.[6]

CARA and DMV repeatedly conflate Tesla's national gallery guidelines with the specific standards applicable to the Greenwich gallery, even though Mr. Bodenheimer testified that the activities Tesla allows at the Greenwich gallery are significantly more restricted than the operations allowed under the national guidelines. Tr. Vol. 2 (Bodenheimer), at 140:21-141:5, 143:15-22, 160:16-19 (AR460-61, 463, 480).[7] There is no contrary evidence. For example, CARA and DMV highlight the national guidelines' statement that gallery employees should "[d]iscuss

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string its Connecticut operations precisely because Connecticut does ***not*** allow Tesla to open retail stores as it has in New York and Massachusetts. Unsurprisingly, Tesla has promoted legislation to remove that restriction. *See* Raised H.B. No. 5310, *An Act Concerning the Licensing of New and Used Car Dealers* (2018).

[6] Despite CARA's mystifying assertion, CARA Br. 15, 26-27, Tesla never has suggested that its galleries and stores are substantially similar.

[7] CARA suggests that the activities in Greenwich thus violate the guidelines, CARA Br. 9, but as Tesla has explained, the guidelines contemplate that Tesla may impose stricter rules on galleries operating in particular states, as it has done in Connecticut. *See* Tesla Ex. 18, at 1 (AR659).

[p]ricing" with consumers. Tesla Ex. 18, at 1 (AR659). This is utterly irrelevant. Each state has its own laws and regulations, and, as already explained, in an over-abundance of caution, at the ***Greenwich*** gallery, Tesla forbids employees from discussing pricing. Likewise, CARA and DMV highlight the national guidelines' statement that consumers may place orders at a gallery "on the Tesla provided Internet terminals." Tesla Ex. 18, at 2 (AR660). But, again, at the ***Greenwich*** gallery, the undisputed testimony is that Tesla does ***not*** allow gallery visitors to place internet orders on the premises. Connecticut consumers, like consumers everywhere else, may place orders on Tesla's California website, but they cannot do so from Tesla's Greenwich gallery.

The Hearing Officer did not find any of the above "facts" now asserted in CARA's and DMV's briefs. *See* Am. Decl. Ruling 2-5 (AR845-48). Instead, the Hearing Officer correctly found that gallery employees spend their time answering questions about sample vehicles and informing interested consumers how they could lawfully purchase vehicles from Tesla's California website or at Tesla stores in other states. And the Hearing Officer expressly noted that gallery "[e]mployees were advised that vehicle orders were not able to be taken at the Greenwich location." *Id.* 4 (AR847). Accordingly, this Court need not disturb any of the factual findings of the Hearing Officer to rule in Tesla's favor.[8]

2. CARA's and DMV's arguments about Tesla's online sales are both irrelevant and incorrect

CARA and DMV nevertheless argue that Tesla needs a license for the gallery based on Tesla's online sales to customers who arrange to pick up their cars at Tesla's ***Milford*** service

[8] For this reason, CARA's and DMV's emphasis on the leniency of the "substantial evidence" standard is misplaced. Tesla does not seek to overturn the Hearing Officer's factual findings of Tesla's gallery activities, but rather the incorrect legal conclusions he applied to those findings.

center. According to CARA and DMV, title passes in Milford as to those sales because Tesla's Motor Vehicle Purchase Agreement (MVPA) gives Tesla the right to sell a vehicle if the purchaser does not "take delivery" of it. CARA Br. 11, 15-16; DMV Br. 11-12, 24. The Hearing Officer, too, relied on this aspect of the MVPA to conclude that title transfers in Connecticut as to these sales. Am. Decl. Ruling 5 (AR848). But, as the record shows, that is ***not*** how the MVPA applies to Connecticut purchasers.

As a threshold matter, whether title passes ***in Milford*** when Tesla makes online sales to Connecticut consumers has no bearing on whether Tesla is selling or offering for sale vehicles at the ***Greenwich gallery***. Tesla Br. 8, 14, 21. CARA's petition sought review of both Tesla's activities at the gallery *and* its activities in Milford, but DMV expressly "decline[d] to issue a declaratory ruling with respect to the Milford facility." AR781; *see* DMV Br. 9 n.2 (admitting that "DMV declined to consider" Milford allegation). The Hearing Officer's decision confirmed that the hearing "was limited to the issue of whether" Tesla's *gallery* activities "constituted the sale of motor vehicles without a dealer's license." Am. Decl. Ruling 3 (AR846); *see* CARA Br. 9 (acknowledging the hearing was limited "to the issue of whether Tesla's proposed activities at its 'Gallery' in the Greenwich location" require a license). What happens at the Milford service center is thus irrelevant to this proceeding.

In any event, even as to Milford the Hearing Officer premised his conclusion on a provision of the MVPA that is inapplicable in Connecticut. That provision, allowing a buyer to take delivery at a Tesla service center, applies ***only*** in states where Tesla is licensed to sell. Tesla Br. 6-7, 15. In Connecticut and other states where Tesla is not licensed to sell, the MVPA instead expressly provides that delivery—including the transfer of title to the buyer—occurs when Tesla loads the vehicle onto the common carrier for shipment, *i.e.*, at Tesla's California factory. Tesla

Ex. 18, at 2 (AR660) (the customer "owns the vehicle as it is loaded onto the transport carrier at the Factory"). Because the buyer owns the car before it enters Connecticut, Tesla has no right under the MVPA to sell it again.

Under well-established case law, Tesla's MVPA is therefore a shipment contract under which "title passes to the buyer at the time and place of shipment." *State v. Cardwell*, 246 Conn. 721, 730-32 (1998) (quoting C.G.S. § 42a-2-401(2)(a)); Tesla Br. 14-16. *Cardwell* holds that a sales contract is *presumptively* a shipment contract *absent "specific proof" to the contrary*. 246 Conn. at 731. Here, not only is there no such "specific proof"; to the contrary, the applicable provision of the MVPA explicitly *provides that title passes upon shipment*—in California. *See id.* at 732 ("[D]elivery is made to the post office or other commercial carrier, and hence to the buyer, within Massachusetts. As a result, the 'sale' of the tickets … occurs in Massachusetts."). Under the MVPA, sales made to Connecticut consumers occur in California, not in Connecticut.

Cardwell also forecloses any argument that Tesla's online sales result from offers made at the Greenwich gallery, or in Connecticut at all. The court there held that an offer for sale is made where it is conveyed, not where it is received. 246 Conn. at 734-35. Tesla conveys offers capable of acceptance in Connecticut from only one place: Tesla's *California* website. Thus, under *Cardwell* and the other authorities discussed in Tesla's brief, Tesla Br. 21-27, Tesla makes no offers for sale in Connecticut, much less at the gallery.

And § 14-52(a) cannot be construed to cover extraterritorial sales or offers. Where a statute carries criminal penalties, as § 14-52 does, courts will not apply the statute to extraterritorial sales or offers absent "a significant indication" the legislature intended to do so. *Cardwell*, 246 Conn. at 737-41. In *Cardwell*, the Court applied this principle to hold that the state's anti-scalping statute did not apply to telephone offers from salespeople in Massachusetts to Connecticut

residents for the sale of tickets delivered by mail from Massachusetts to Connecticut. *Id.*[9] Under the same reasoning, § 14-52 cannot be read to reach Tesla's California offers to Connecticut residents to purchase cars shipped to them from its California factory. As in *Cardwell*, such sales do not take place in Connecticut, and there is no indication—and indeed no contention by CARA or DMV—that the legislature intended to require a license for such sales under § 14-52.[10]

CARA's claim that *Cardwell* is inapposite because the defendant there maintained "no retail location in Connecticut" is both inaccurate and beside the point. *See* CARA Br. 18. The *Cardwell* defendant *did* have a Connecticut office, from which employees advised consumers to telephone its Massachusetts office to purchase event tickets—just as Tesla's gallery employees advise consumers to visit Tesla's California website to purchase vehicles. *Cardwell*, 246 Conn. at 736-37. And regardless, the key to the Court's conclusion in *Cardwell* that neither sales nor offers occurred in Connecticut was not where Cardwell's offices were located but where (1) title to the purchased goods passed and (2) the offeror was located when the offer was conveyed. Because title passed in Massachusetts when the goods were delivered to a common carrier, and because the offers were conveyed from Massachusetts, no sales or offers occurred in Connecticut.

Again, online sales expressly are not at issue here, and the Court does not have to engage in this analysis. But should the Court decide to consider this question, it is clear that the MVPA is a shipment contract, title passes in California, and online sales would not implicate § 14-52(a).

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[9] Like this case, *Cardwell* involved the interpretation and application of a criminal statute in a non-criminal proceeding. 246 Conn. at 723 & n.1.

[10] CARA cites a number of out-of-jurisdiction cases for the proposition that "a state may regulate a transaction even if the entirety of the transaction does not occur within the state's borders." CARA Br. 18-19. But whether a state *may* do so is irrelevant; the question is whether it has chosen to do so, and there is no indication that Connecticut has.

What is more, Tesla has now revised the MVPA, confirming even more explicitly that purchasers in any state where Tesla is not licensed to sell take title *before* shipment. AR827-30 (Revised MVPA); *see* Tesla Br. 7, 10, 19-21. Neither CARA nor DMV challenges the authenticity of the revised MVPA, and DMV *expressly acknowledges* that it "align[s] with a shipment contract," DMV Br. 12 n.4, eliminating any argument that sales can occur in Connecticut. Yet both CARA and DMV assert that the Court should not consider the revised MVPA, because Tesla implemented it after the hearing. CARA Br. 15 n.7; DMV Br. 24 n.7. This argument defies logic: The entire purpose of a declaratory ruling is to clarify disputed legal questions to allow parties to conform their conduct going forward. Tesla Br. 19-20; *Bysiewicz v. Dinardo*, 298 Conn. 748, 757 (2010). Given that purpose, and given that Tesla properly placed the revised MVPA before the Hearing Officer on a timely motion for reconsideration, *see* Tesla Br. 21-22; AR827-30, the Court should consider the revised MVPA, if it decides to reach this issue at all. And it should conclude that the revised document definitively negates the incorrect reading urged by CARA and DMV, who have never suggested *any* argument that sales or offers could possibly occur in Connecticut under the revised MVPA.

3. Straightforward application of Section 14-52(a) to Tesla's gallery activities requires reversal

Stripping away CARA's and DMV's irrelevant and misleading arguments leaves a simple analysis under § 14-52(a). Under Connecticut law, "[a] 'sale' consists in the passing of title from the seller to the buyer for a price," C.G.S. § 42a-2-106(1), and an "offer" for sale requires a promise that "creates a power of acceptance in the offeree to transform the offeror's promise into a contractual obligation," *Kieffer*, 1990 WL 265725, at *10. Because title to a Tesla vehicle never passes in Connecticut (let alone at the Greenwich gallery, the only location at issue), Tesla is not "selling" vehicles at the gallery. And because Tesla's gallery employees make no offers

that create the power of acceptance—but rather direct consumers to Tesla's website, where offers conveyed in California can be viewed and accepted (although not at the gallery)—Tesla is not "offering for sale" vehicles at the gallery or in Connecticut generally. Reversal is thus required.

II. PROHIBITING TESLA'S GALLERY ACTIVITIES WOULD IMPERMISSIBLY INFRINGE TESLA'S FIRST AMENDMENT RIGHT TO FREE SPEECH

As explained in Tesla's opening brief (at 30-35), construing § 14-52 to prohibit Tesla's Greenwich gallery activities, as the Hearing Officer did, would violate Tesla's First Amendment right to engage in protected commercial speech. *See Cardwell*, 246 Conn. at 737 n.12. Neither CARA nor DMV meaningfully addresses this constitutional argument.[11]

a. Tesla's speech at the Greenwich gallery is protected by the First Amendment

Providing promotional and educational information about Tesla vehicles and telling consumers where they can lawfully buy them, as Tesla does at its Greenwich gallery, is unquestionably "commercial speech" entitled to constitutional protection. CARA and DMV do not argue otherwise, instead claiming that the Hearing Officer's interpretation of § 14-52 does "not prohibit speech" because it "simply require[s] a license before [Tesla] can engage in certain commercial activities." CARA Br. 25; *see* DMV Br. 27. The question here, however, is not whether Connecticut may constitutionally require a license to engage in specified commercial conduct

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[11] Contrary to CARA's baseless claim, Tesla did not "waive" its First Amendment argument in its application for a manufacturer license. *See* CARA Br. 25. As CARA acknowledges, *see id.* at 4 n.1, 25 n.15, Tesla's application agreed only that DMV may "commence an administrative proceeding pertaining to [Tesla's] license status." CARA Post-Hr'g Br., Tab A, at 3 (AR689). This proceeding is not an administrative proceeding about Tesla's status as a licensed manufacturer, but a petition by CARA for a declaration that Tesla's display gallery violates § 14-52. Regardless, CARA cites no language that could possibly constitute such a waiver. And CARA's own case establishes that any waiver of constitutional rights must be shown by "clear and compelling evidence" to be "voluntary, knowing, and intelligent," with "every reasonable presumption [to be indulged] against waiver" and no "presume[d] acquiescence in the loss of such rights." *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1094-95 (3d Cir. 1988) (internal quotation marks omitted). No such showing has been—or could be—made here.

(*i.e.*, selling or offering cars for sale) within the state. Rather, the question is whether Connecticut law, if read to bar manufacturers from promoting commercial products that are lawfully available for purchase in other states, would impermissibly infringe protected commercial speech. Under longstanding federal and Connecticut case law, it certainly would. Tesla Br. 31.

The First Amendment does not protect commercial speech if it is "misleading []or related to unlawful activity." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). But that is not the issue here. DMV's assertion that merely operating the gallery is unlawful as it allegedly operates outside the bounds of Connecticut's licensing requirements misses the point. *See* DMV Br. 27-28. The question is whether Connecticut may constitutionally prohibit Tesla from engaging in ***non***-misleading speech promoting products ***lawfully*** available for purchase ***elsewhere***, *i.e.*, on Tesla's California website or at Tesla stores in other states. Unlike the commercial speech prohibited in the cases DMV cites, Tesla's speech at the Greenwich gallery promotes a lawful product and is not misleading in any way. Tesla Br. 31.[12]

DMV relies on *Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001), but that case only supports Tesla's position. In *Ford*, the Texas statute in question prohibited manufacturers from retailing motor vehicles in Texas. *Id.* at 506. Ford nevertheless sought to advertise the sale of motor vehicles available for direct purchase in Texas—an unlawful activity. The Fifth Circuit, unremarkably, affirmed that a state can ban advertising of an

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[12] *Cf. AutoMaxx, Inc. v. Morales*, 906 F. Supp. 394, 402 (S.D. Tex. 1995) (where Texas law validly banned certain individuals from brokering new vehicles in state, accompanying restriction on "the speech component of a brokering transaction" was constitutional); *Blue v. McBride*, 252 Kan. 894, 921 (1993) (no First Amendment interest "when the commercial activity itself is illegal"); *Kelley Blue Book Co. v. La. Motor Vehicle Comm'n*, 204 So. 3d 1139, 1150 (La. Ct. App. 2016) (use of "invoice price" by manufacturer inherently misleading because "[d]ue to holdbacks, incentives, and rebates, the invoice amount bears little relation to the dealer's true cost" (quoting *Joe Conte Toyota v. La. Motor Vehicle Comm'n*, 24 F. 3d 754, 757-58 (5th Cir. 1994)).

unlawful activity, upholding Texas's prohibition on advertising direct sales in Texas. *Id.* at 507. Furthermore, the court recognized, "if [Texas had] prohibited advertising the sale of motor vehicles by licensed dealers, a commercial activity lawful in Texas, the regulation ***would invoke*** the protections of the First Amendment." *Id.* at 506 (emphasis added). Here, Connecticut law prohibits manufacturers only from selling or offering for sale vehicles ***in Connecticut***. There is nothing unlawful about promoting in Connecticut the lawful sale of vehicles outside Connecticut. Tesla seeks merely to advertise its lawful business by promoting the vehicles it sells in other states. This is exactly the conduct upheld in *Cardwell*. 246 Conn. at 736 (defendant could lawfully advertise in Connecticut tickets legally available through Massachusetts office).

For that reason, the applicable holding here is not *Ford*, but *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, 492 F.3d 484 (4th Cir. 2007). There, the Fourth Circuit wrote that interpreting a South Carolina law to ban advertising out-of-state goods or services "would threaten First Amendment problems" because a state may not "bar a citizen of another State from disseminating information about an activity that is legal in that State." *Id.* at 493 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975)). The court also concluded that the First Amendment barred reading South Carolina law "as prohibiting … manufacturers from advertising within South Carolina on the grounds that advertisements by themselves constitute sales." *Id.* at 493 n.3. The statute, instead, was "best construed to refer to solicitations of the sales that would otherwise be illegal under the statute—sales within South Carolina—rather than the extraterritorial transactions that South Carolina may not directly regulate." *Id.*

The record shows that Greenwich gallery employees display real (but not drivable) Tesla vehicles, truthfully promote their benefits to consumers, and truthfully explain how consumers may lawfully purchase the vehicles online or at Tesla stores in other states. Time and again,

courts have held that communication of this kind—which serves a crucial informational function—is exactly what commercial-speech doctrine is intended to protect. *See, e.g.*, *United States v. Caronia*, 703 F.3d 149, 162-69 (2d Cir. 2012). CARA and DMV accept that Tesla may lawfully sell its vehicles to Connecticut consumers online and in other states. Tesla's right to engage in speech concerning these lawful activities is thus presumptively protected by the First Amendment. As in *Carolina Trucks*, the statute should be construed to avoid prohibiting commercial speech about sales that would occur in states where the sales are legal.

b. No substantial governmental purpose would be advanced by the infringement of Tesla's commercial speech rights that the ruling below imposed

Because Tesla's activities at the Greenwich gallery constitute protected commercial speech, they can be restricted only under extremely limited circumstances. To be constitutional, a restriction must (1) "directly advance[]" a (2) "substantial" governmental interest and (3) be "not more extensive than is necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 566. The Hearing Officer's decision does not even attempt to address, much less meet, this standard, and neither CARA nor DMV even attempts to argue that it does. Neither suggests that Connecticut has any legitimate interest in preventing its citizens from receiving information about legal activities, much less a substantial one. *Cf. Bigelow*, 421 U.S. at 827-28; *Carolina Trucks*, 492 F.3d at 493. Indeed, Connecticut's interest is the opposite. Tesla Br. 32-33. CARA and DMV retreat to the assertion that § 14-52 is a valid exercise of the State's "police power," CARA Br. 13, 23-25; DMV Br. 32. That is irrelevant. Connecticut has the power to regulate the motor vehicle industry in Connecticut and to impose reasonable licensing requirements on in-state sales. Section 14-52 does that, and for the reasons addressed above and in Tesla's opening brief, it does not prohibit any activity Tesla conducts in its gallery. If the Connecticut Legislature were to enact a provision like the Hearing Officer erroneously posits and CARA and DMV champion, that

provision would have to be struck down. The police power always "must be exercised within constitutional limits." *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1019 (9th Cir. 2004) (internal quotation marks omitted); *see* Tesla Br. 33-34 & n.15.

The cases CARA cites in support of its "police power" argument do not even address enactments claimed to restrict speech unconstitutionally.[13] Instead, they address the constitutionality of laws under other constitutional provisions. The issue here is speech: whether Connecticut may permissibly prohibit an out-of-state seller from displaying its cars in a gallery, promoting them to consumers, and telling consumers how they may make lawful out-of-state purchases. These are classic examples of commercial speech that states may restrict ***only*** with laws "narrowly drawn" to directly advance a "substantial interest." *Cent. Hudson*, 447 U.S. at 564-65; *see* Tesla Br. 30-31, 34 n.15.

The few First Amendment cases CARA does cite do not aid its argument. In *Mastrovincenzo v. City of New York*, the Second Circuit held that New York City could constitutionally require a license to sell graffiti-painted clothing on city streets. 435 F.3d 78, 82 (2d Cir. 2006). The court found that the sellers ***were*** entitled to First Amendment protection, *id.* at 97, but that the license requirement was constitutional because it was narrowly tailored to achieve the government's interest in "reducing urban congestion," *id.* at 81. CARA identifies no comparable government interest justifying its proposed blanket and entirely unbounded ban on Tesla's gallery activities, and does not come close to demonstrating that such a ban would be narrowly tailored to "directly advance[]" such an interest. *See Cent. Hudson*, 447 U.S. at 566. Moreover, the

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[13] *See Blue Sky Bar, Inc. v. Town of Stratford*, 203 Conn. 14 (1987) (no mention of First Amendment); *C & H Enters., Inc. v. Comm'r of Motor Vehicles*, 167 Conn. 304 (1974) (same); *Hartland v. Jensen's, Inc.*, 146 Conn. 697 (1959) (same); *Cyphers v. Allyn*, 142 Conn. 699 (1955) (same); *Clapp v. Ulbrich*, 140 Conn. 637 (1954) (same); *Schwartz v. Kelly*, 140 Conn. 176 (1953) (same); *Oppelt v. Mayo*, 26 Conn. Supp. 329 (Conn. Super. Ct. 1966) (same).

Second Circuit specifically upheld the licensing requirement because it "does not operate as an absolute bar against the sale of expressive items." *Id.* at 100-01; *see also Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 296 (2007) ("ban[ning] the dissemination of truthful information" would likely violate First Amendment). Here, requiring Tesla to obtain a dealer's license would not just "regulate" Tesla's commercial speech at the gallery but would impermissibly ***ban*** Tesla from engaging in that speech, as manufacturers like Tesla may not hold dealer licenses.

Similarly, *Johnson v. City & County of Philadelphia* holds only that a city may prohibit the posting of signs on publicly owned utility poles, streetlights, sign posts, and other public property. 665 F.3d 486, 488 (3d Cir. 2011). The court found the posters ***were*** entitled to First Amendment protection, but that the regulation was constitutional because it was narrowly tailored to promote the "significant government interest[s]" of "traffic safety" and "the appearance of the city." *Id.* at 491-92. Critical to the decision was that the law did not prohibit placing signs on private property. *Id.* at 494-95. Here, Tesla seeks only to promote its cars at its private gallery that complies with the Town's zoning and other requirements. And again, neither CARA nor DMV articulates *any* state interest justifying a total ban on that activity, much less a substantial interest that would be directly advanced by such a ban and could not be advanced by narrower means. *See Cent. Hudson*, 447 U.S. at 566.

CONCLUSION

The Court should sustain the appeal, reverse the Hearing Officer's ruling, and hold that Tesla's Greenwich gallery activities do not require a license under Connecticut law.

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Respectfully submitted,

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CERTIFICATION

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